

FILED

12:25 O'Clock P M

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

MAR 31 2010

JEANNE HICKS, Clerk
BY Rita Storms
Deputy

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: March 31, 2010

TITLE:

COUNSEL:

STATE OF ARIZONA

Sheila Sullivan Polk
Yavapai County Attorney
Bill Hughes, Esq.
Steven Sisneros, Esq.
Deputy Yavapai County Attorneys

(Plaintiff)

(For Plaintiff)

vs.

JAMES ARTHUR RAY

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Prescott, AZ 86301

Luis Li, Esq.
Brad Brian, Esq.
Truc Do, Attorney at Law
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Los Angeles, CA 90071

(Defendant)

(For Defendant)

**UNDER ADVISEMENT RULING ON STATE'S REQUEST FOR ORDER DIRECTING ALL
PARTIES TO REFRAIN FROM EXTRAJUDICIAL COMMENTS "GAG ORDER" AND
ORDER LIMITING EXTRAJUDICIAL STATEMENTS**

The Court has considered the State's Request for Order Directing All Parties to Refrain from Extrajudicial Comments – "Gag Order" and the Supplement to that request, the Defendant's Response, the Defendant's Opposition to State's Request, the Application of KPNX Broadcasting Co. and Phoenix Newspapers, Inc. to Intervene and Memorandum, the State's Response to Application of KPNX Broadcasting, the State's Reply to Defendant's Response, the Defendant's Further Response to State's Request, and the arguments of counsel.

A defendant's right to a fair trial before an impartial jury, a right that is protected by the Sixth Amendment to the United States Constitution and by Article II, §§ 23 and 24 of the Arizona Constitution, "is an essential part of our system of justice." *Levine v. United States District Court*, 764 F.2d 590, 597 (9th Cir.1985), citing *Nebraska Press Association v. Stuart*, 427 U.S. 539, 551, 96 S.Ct. 2791, 2799, 49 L.Ed.2d 683 (1976). Furthermore, the public and the government have a legitimate expectation that the "judicial system will produce fair results." *Id.*

AFTER 12:00PM

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether private talk or public print." *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907) (per Holmes, J.); see *Estes v. Texas*, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 14 L.Ed.2d 543 (1965). . . .

Id. (citations in original). Thus, "[t]he potential for injury to the integrity of the judicial process is significant in cases involving trial publicity." *Id.*

It is clear from the information provided by both parties that pre-indictment and pre-trial media coverage has been extensive in this matter. Although the parties have not expressed to the Court continuing or additional concerns regarding publicity since the State's motion was argued on February 12, 2010, the potential for harm to the administration of justice is significant; therefore limitations on the extrajudicial statements of certain trial participants are warranted and are consistent with the rights guaranteed by the First Amendment. *KPNX Broadcasting Company v. Superior Court*, 139 Ariz. 246, 254-57, 678 P.2d 431, 439-42 (1984), *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1065-76, 111 S.Ct. 2720, 2740-45, 115 L.Ed.2d 888 (1991).

ER 3.6 of the Arizona Rules of Professional Conduct (Ariz. R. Sup. Ct. 42) and similar ethical rules in other states are the product of continual efforts by courts, the legal profession, and others to address difficult issues that can arise when the "often competing interests of free press and fair trial strain against each other." *KPNX Broadcasting Company v. Superior Court*, 139 Ariz. at 248, 678 P.2d at 433. Chief Justice Rehnquist summarized the history of this development in delivering the opinion of the Supreme Court on the standard to be applied to the speech of lawyers representing clients in pending cases. *Gentile v. State Bar of Nevada*, 501 U.S. at 1066-68, 111 S.Ct. 2740-41. As was stated by Chief Justice Rehnquist in *Gentile*, the "'substantial likelihood of material prejudice' standard[, which is implemented by ER 3.6,] constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Id.*, 501 U.S. at 1075, 111 S.Ct. at 2745. Thus, it is appropriate to apply this "substantial likelihood" standard in setting forth an order restricting extrajudicial statements by attorneys and nonlawyer assistants. The Court further concludes that it is appropriate to include the special responsibilities of a prosecutor as set forth in ER 3.8(f) in an order addressing trial publicity and extrajudicial statements.

The Court notes that the State requests that any order regarding extrajudicial statements apply to attorneys and their assistants, which is the category of persons addressed above, and to "all employees of the Yavapai County Sheriff's Office." With regard to the Sheriff's Office, this Court concludes that at this time any concerns are appropriately addressed by requiring prosecutors to comply with the duty to exercise reasonable care to prevent other persons who are associated with or assisting the prosecutor from making extrajudicial statements prohibited under ER 3.6 or ER 3.8(f).

For the reasons set forth above,

IT IS ORDERED **granting** the State's Request in part; and

IT IS FURTHER ORDERED as follows:


(1) All attorneys appearing in this matter, as well as their associates, must comply with the requirements of ER 3.6, ER 5.1, and ER 5.3 of the Arizona Rules of Professional Conduct with regard to trial publicity and extrajudicial statements.

(2) Except as permitted by ER 3.6(a), (b), and (c) of the Arizona Rules of Professional Conduct, all attorneys appearing in this matter, their associates, and their nonlawyer assistants must not make extrajudicial statements that they know or reasonably should know will be disseminated by means of public communication and that relate to the six subjects that are listed in Comment [5] to ER 3.6. For purposes of this order, these six subjects are described as follows:

1. the character, credibility, reputation or criminal record of a party or witness, or the identity of a witness, or the expected testimony of a party or witness;
2. the possibility of a plea of guilty to an offense or the existence or contents of any confession, admission, or statement given by a defendant or the refusal or failure to make a statement;
3. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
4. any opinion as to the guilt or innocence of a defendant;
5. information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; and
6. the fact that a defendant has been charged with a crime, unless there is included with any statement of that fact an explanation that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(3) All prosecutors in this matter must comply with the requirements of ER 3.8(f) of the Arizona Rules of Professional Conduct regarding extrajudicial comments and statements.

DATED this 31st day of March, 2010.


Warren R. Darrow
Superior Court Judge

cc: Victim Services Division

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